



## MILPITAS PLANNING COMMISSION STAFF REPORT

December 6, 2018

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**APPLICATION:** ZONING TEXT AMENDMENT – PROHIBITION ON COMMERCIAL CANNABIS ACTIVITIES AND PERSONAL USE CANNABIS CULTIVATION REGULATIONS – CITYWIDE – P-ZA18-0004: City-initiated Zoning Ordinance Text Amendment to prohibit commercial cannabis activities. The proposed regulations would prohibit all medical and adult-use commercial cannabis activities, including but not limited to, commercial cultivation, delivery, distribution, manufacturing, microbusinesses, retail/dispensaries and testing laboratories. The proposed ordinance would also regulate indoor cultivation of cannabis for personal use and prohibit outdoor cultivation of cannabis as permitted by State Law.

**RECOMMENDATION:** Consider and adopt Resolution No. 18-022 ZONING TEXT AMENDMENT – PROHIBITION ON COMMERCIAL CANNABIS ACTIVITIES AND PERSONAL USE CANNABIS CULTIVATION REGULATIONS – CITYWIDE – P-ZA18-0004: Consider and adopt a resolution recommending that the City Council adopt a City-initiated Zoning Ordinance Text Amendment to prohibit commercial cannabis activities, to prohibit outdoor cultivation for personal use, and to regulate indoor cultivation of cannabis for personal use.

**LOCATION:** Citywide

**PEOPLE:**

Project Applicant: City of Milpitas

Project Planner: Rozalynne Thompson, Senior Planner

**LAND USE:**

General Plan Designation: Citywide

Zoning District: Citywide

Overlay District: None

**ENVIRONMENTAL:** Categorically exempt pursuant to CEQA Guidelines Sections 15060(c)(3) and 15061(b)(3)

**EXECUTIVE SUMMARY**

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Based on the direction received from City Council at its November 20, 2018 meeting, staff has prepared a zoning ordinance to prohibit commercial cannabis activities. The ordinance also regulates personal indoor cultivation and prohibits personal outdoor cultivation. This proposed

zoning ordinance requires an amendment to the Zoning Code (Title XI of the Municipal Code). Specifically, the zoning text amendment adds Section XI-10-13.15 (“Cannabis Uses”) to the Zoning Ordinance and amends Section XI-10-13.05 (“Home Occupations”) of the Zoning Code.

The proposed ordinance is consistent with the City of Milpitas General Plan and all other applicable state and local laws.

Staff recommends that the Planning Commission recommend that the City Council adopt Zoning Text Amendment ZA18-0004, as set forth in Exhibit B of the staff report, to prohibit commercial cannabis activities, prohibit outdoor cultivation of cannabis for personal use, and regulate the indoor cultivation of cannabis for personal use based on the findings in this staff report and the attached resolution.

## **BACKGROUND**

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On October 24, 2018, staff presented to the Planning Commission a zoning text amendment to allow commercial cannabis retail (storefront and non-storefront) and testing laboratories (subject to regulations) and to regulate personal indoor cannabis cultivation. The Planning Commission recommended allowing non-storefront cannabis retailers in industrial zoning districts (M1, M2, and MP) only, prohibiting all other commercial cannabis uses, and increasing the minimum buffer distance between commercial cannabis uses and daycare centers and youth centers from 200 feet to 600 feet. The Planning Commission also suggested that the City Council consider limiting the number of non-storefront retail establishments to a maximum of four citywide and placing a cannabis use tax on the ballot in 2020.

The City Council considered the Planning Commission's recommendations, along with the proposed zoning text amendment and a regulatory ordinance to establish the regulatory framework for commercial cannabis uses at a public hearing on November 20, 2018. Hundreds of e-mails were submitted by members of the public, including a community initiated petition with over 5,000 signatures. In addition, over 100 speakers voiced their opinion at the hearing. Almost all public comments were opposed to commercial cannabis activities in Milpitas.

In response to public input, the City Council rejected the regulatory and zoning ordinances and redirected staff to prepare an ordinance that would permanently prohibit all commercial cannabis activities within all areas of the City. The City Council directed that the zoning text be adopted on an urgency and regular (non-urgency) basis. As the proposed zoning ordinance requires an amendment to the Zoning Code (Title XI "Zoning, Planning and Annexation" of the Municipal Code), this zoning text amendment to permanently ban commercial cannabis activities and personal outdoor cultivation and to regulate personal indoor cultivation is before the Planning Commission for recommendation to City Council.

## **PROJECT DESCRIPTION**

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Staff has prepared a zoning ordinance to prohibit commercial cannabis activities. The ordinance also regulates personal indoor cultivation and prohibits personal outdoor cultivation. This proposed ordinance requires an amendment to the Zoning Code (Title XI of the Municipal Code). Specifically, the zoning text amendment amends Section 13 ("Special Uses") of the Zoning Code by adding a new Section XI-10-13.15 ("Cannabis Uses") and amending Section XI-10-13.05 ("Home Occupations").

The sections of the proposed ordinance are discussed in further detail in this report.

## **PROJECT ANALYSIS**

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### **General Plan Consistency**

The City's General Plan is a long-range policy document that provides a vision and framework for future development of the City. The prohibition of commercial cannabis activities and personal outdoor cultivation of cannabis would prevent potentially detrimental health, safety, and quality of life issues that can be associated with such uses, such as loitering, increased security risks to nearby residences and businesses, increased risk of theft and other crimes, dangerous waste, water, and electricity usage, and strong odors that can be detectable beyond the property boundaries. The

following General Plan guiding principles and implementing policies are applicable to this Zoning Code amendment to regulate cannabis-related activities:

**Land Use Implementing Policy 2.a-I-9**

Prohibit encroachment of incompatible uses into industrial lands, and prohibit nonindustrial uses that would result in the imposition of additional operational restrictions and/or mitigation requirements on industrial users due to land use incompatibility issues.

**Land Use Policy 2.a-I-17**

Foster community pride and growth through beautification of existing and future development.

**Land Use Policy 2.a-I-27**

Develop the Town Center as an architecturally distinctive mixed-use complex which will add to Milpitas' identity and image.

**Land Use Policy 2.a-1-29**

Develop the Midtown area, as shown on the Midtown Specific Plan, as an attractive and economically vital district that accommodates a mixture of housing, shopping, employment, entertainment, cultural and recreational activities organized within a system of landscaped boulevards, streets and pedestrian/bicycle linkages.

**Land Use Policy 2.a-1-31**

Develop the Transit area, as shown on the Transit Area Plan, as attractive, high density, urban neighborhoods with a mix of land uses around the light rail stations and the future BART station. Create pedestrian connections so that residents, visitors, and workers will walk, bike, and take transit. Design streets and public spaces to create a lively and attractive street character, and a distinctive identity for each sub-district.

**Land Use Policy 2.d-I-3**

When reviewing major land use or policy changes, consider the availability of police and fire protection, parks and recreation and library services to the affected area as well as the potential impacts of the project on existing service levels.

**Land Use Policy 2.a-G-1**

Maintain a land use program that balances Milpitas' regional and local roles by providing for a highly amenable community environment and a thriving regional industrial center.

The “Findings for Approval” section below includes an analysis of the zoning amendment’s consistency with applicable General Plan guiding principles and implementation policies.

**Zoning Text Amendments**

The proposed zoning text amendment amends Title IX of the Municipal Code. The discussion below presents an overview of the proposed amendments by section and explains the purpose of the changes.

**Section XI-10-13.15 CANNABIS USES**

### **XI-10-13.15(A) - Purpose**

This section establishes the purpose and intent of the regulations, which is to prohibit all commercial cannabis uses and regulate personal indoor cultivation of cannabis. Further, this section prohibits personal outdoor cultivation of cannabis, including outdoor cultivation by qualified patients and their caregivers.

### **XI-10-13.15(B) - Definitions**

This proposed section creates definitions to guide implementation and administration of the regulations. Notable definitions include the following:

- “Cannabis” means all parts of the plant *Cannabis sativa* Linnaeus, *Cannabis indica*, or *Cannabis ruderalis*, whether growing or not; the seeds thereof; the resin, whether crude or purified, extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin. “Cannabis” also means the separated resin, whether crude or purified, obtained from marijuana. “Cannabis” includes “cannabis” as defined in Business and Professions Code, Section 26001 and in Section 11018 of the Health and Safety Code. “Cannabis” shall not include industrial hemp as defined by Section 11018.5 of the Health and Safety Code.
- “Cannabis delivery” means the commercial transfer of cannabis or cannabis products to a customer. “Cannabis delivery” also includes the use by a cannabis retailer of any technology platform that enables customers to arrange for or facilitate the commercial transfer by a licensed retailer of cannabis or cannabis products.
- “Cannabis products” means cannabis that has undergone a process whereby the plant material is transformed into a concentrate, including, but not limited to, concentrated cannabis, or an edible or topical product containing cannabis or concentrated cannabis and other ingredients. Cannabis products include “cannabis products” as defined in Business and Professions Code, Section 26001.
- “Commercial cannabis use” includes all cannabis cultivation, cannabis manufacture, cannabis distribution, cannabis testing laboratories, cannabis microbusinesses, cannabis retailers, cannabis delivery, and sale of cannabis and/or cannabis products, whether intended for medical or adult-use, and whether or not such activities are conducted for profit. Commercial cannabis uses include “commercial cannabis activity” as defined in Business and Professions Code, §26001, and includes any activity that requires, or may require in the future, a license from a State licensing authority pursuant to the Medicinal and Adult-Use Cannabis Regulation and Safety Act (Business and Professions Code, Division 10), as may be amended. Commercial cannabis use does not include the activities of a qualified patient or a primary caregiver that are exempt from State licensure pursuant to Business and Professions Code, Section 26033.

- “Indoor” means any location that is totally contained within a fully enclosed and secure private residence or accessory building located on the grounds of the private residence.
- “Personal cultivation” means cannabis cultivation for a natural person’s own personal use and possession in accordance with this Code and state law, including but not limited to Health and Safety Code Sections 11362.1 and 11362.2, as may be amended, and such person does not sell or distribute cannabis to any other person. “Personal use” also means and includes cultivation of medical cannabis conducted by a qualified patient exclusively for his or her personal medical use, and cultivation conducted by a primary caregiver for the personal medical purposes of no more than five specified qualified patients for whom he or she is the primary caregiver, in accordance with state law, including Health and Safety Code Sections 11362.7 and 11362.765, as may be amended. Except as herein defined, personal cultivation does not include, and shall not authorize, any cultivation conducted as part of a business or commercial activity, including cultivation for compensation or retail or wholesale sales of cannabis.
- “Private residence” means a house, an apartment unit, accessory dwelling unit, a mobile home, or other similar dwelling occupied for residential purposes.
- “Outdoor” means any location that is not totally contained within a fully enclosed and secure accessory building or primary residence.

#### **XI-10-13.15(C) - Personal Cultivation of Cannabis**

Under the Medicinal and Adult Use Cannabis Regulation and Safety Act (“MAUCRSA”), a local jurisdiction cannot prohibit the personal indoor cultivation of up to six cannabis plants inside a private residence or inside a fully enclosed and secure accessory structure per Section 11362.2(b)(2) of the Health and Safety Code. However, Section 11362(b)(1) of the Health and Safety Code allows local jurisdictions to enact and enforce “reasonable regulations” to the indoor personal cultivation of cannabis plants. Further, local jurisdictions retain the authority to completely prohibit personal cultivation outdoors upon the grounds of a private residence per Section 11362.2(b)(3) of the Health and Safety Code.

This section allows and regulates the personal cultivation of cannabis within a single private residence or accessory structure and bans personal outdoor cultivation. Up to six plants may be cultivated within a private residence at any one time. However, this section requires that a residence must maintain fully functional kitchen, bathroom, and bedroom areas and prohibits the use of gas products and generators to cultivate cannabis. Moreover, all areas for cannabis cultivation must be located in a fully enclosed and secure structure, which is a space within a building, greenhouse or other legal structure which has a complete roof enclosure supported by connecting walls extending from the ground to the roof, which is secure against unauthorized entry, provides complete visual screening, and which is accessible only through one or more lockable doors and inaccessible to minors.

#### **XI-10-13.15(D) - Commercial Cannabis Uses**

Under Business and Professions Code Section 26200(a)(1), the MAUCRSA preserves local jurisdictions' authority to adopt and enforce local ordinances to regulate commercial cannabis businesses, including the authority to completely prohibit commercial cannabis uses. This section prohibits all commercial cannabis uses, including cultivation, manufacturing, distribution, testing laboratories, microbusinesses, and retailers, whether or not for profit. Additionally, this section prohibits the operation of cannabis delivery services in the city, including prohibiting deliveries originating from businesses outside of the city, to the full extent of State law.

#### **XI-10-13.15(E) - Public Nuisance; Effect of State Law**

This section declares any real property used in violation of this section a public nuisance and addresses state law limits on cannabis-related penalties.

#### **XI 10-13.05 - Home Occupations**

This section governs home occupation uses, which are businesses conducted by residents in their dwelling unit. Such uses have been determined to be incidental and secondary to the primary use. To ensure that no commercial cannabis activity is conducted within the city, this zoning text amendment would add a cross reference to the prohibition on "commercial cannabis uses" to the list of uses not considered permissible home occupation uses under Section XI-10-13.05 of the Municipal Code.

#### **FINDINGS FOR APPROVAL (OR DENIAL)**

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A finding is a statement of fact relating to the information that the Planning Commission has considered in making a decision. Findings shall identify the rationale behind the decision to take a certain action.

#### ***Zoning Amendment (Section XI-10-57.02(G)(3))***

- 1. The proposed amendment is consistent with the General Plan.*

The proposed Zoning Text Amendment is consistent with the adopted General Plan and all relevant specific plans. The prohibition of commercial cannabis activities and personal outdoor cultivation of cannabis would prevent potentially detrimental health, safety, and quality of life issues that can be associated with such uses, such as loitering, increased security risks to nearby residences and businesses, and strong odors that can be detectable beyond the property boundaries. Therefore, the proposed Zoning Text Amendment to permanently prohibit commercial cannabis uses reinforces the General Plan policies to foster community pride and growth through beautification of existing and future development and to prohibit incompatible land uses in industrial areas (Milpitas General Plan, Land Use Element, Policy 2.a-I-9 and Policy 2.a-I-17) and those policies intended to protect and develop commercial districts as attractive and economically vital areas that promote the City's image (Milpitas General Plan, Land Use Element, Policies 2.a-I-27 (Town Center), 2.a-I-29 (Midtown Area), 2.a-I-31 (Transit Area)).

Because cannabis remains illegal under federal law, cannabis-related businesses have limited access to the banking system and largely operate on a cash-only basis. This characteristic makes cannabis businesses attractive for robbery, burglary, and other theft offenses. Additionally, the strong smell and visibility of marijuana cultivated outdoors or even grown or stored indoors creates an “attractive nuisance” that can increase the risk of crime. Commercial scale cultivation, processing, and manufacture can also lead to excess or dangerous waste, water, and electricity usage. Therefore the prohibition on commercial cannabis uses is consistent with the General Plan, Land Use Element, Policy 2.d-I-3, to consider the availability and potential impacts of major land use or policy changes on existing police and fire services.

In addition, the prohibition on commercial cannabis uses and outdoor personal cannabis cultivation is consistent with the City’s principle of maintaining a land use program that balances Milpitas’ regional and local roles by providing for a highly amenable community environment and a thriving regional industrial center (Milpitas General Plan, Land Use Element, Policy 2.a-G-1). The potential fiscal and economic benefits of commercial cannabis uses are outweighed by the potential costs and adverse community environment impacts, particularly to youth and quality of life issues. Adoption of this ordinance would be consistent with the intent of the City’s existing General Plan regulations that would serve to protect the public health, safety, and welfare of the citizens of Milpitas. The prohibition of commercial cannabis activities and personal outdoor cannabis cultivation will not conflict with or impede achievement of any of the goals, policies, or land use designations established in the General Plan.

*2. The proposed amendment will not adversely affect the public health, safety and welfare.*

The proposed amendments to prohibit commercial cannabis activities and personal outdoor cultivation of cannabis will not adversely affect the public health, safety and welfare because it will maintain current development patterns and uses in the City. Further, the prohibition of commercial cannabis activities and personal outdoor cultivation of cannabis would prevent potentially detrimental health, safety, and quality of life issues that can be associated with such uses, such as loitering, increased security risks to nearby residences and businesses, increased risk of theft and other crimes, dangerous waste, water, and electricity usage, and strong odors that can be detectable beyond the property boundaries.

## **ENVIRONMENTAL REVIEW**

This Ordinance is not a project within the meaning of Section 15378 of the State of California Environmental Quality Act (“CEQA”) Guidelines, because it has no potential for resulting in physical change in the environment, directly or indirectly, and therefore is exempt from environmental review pursuant to CEQA Guidelines Section 15060(c)(3). If this Ordinance is deemed to be a project, it is nonetheless exempt from environmental review under the general rule stated in CEQA Guidelines, Section 15061(b)(3), that CEQA applies only to projects which have the potential for causing a significant effect on the environment. The Ordinance prohibits commercial cannabis businesses and outdoor personal cannabis cultivation from establishing or occurring in the City and therefore will maintain current development levels. Accordingly, this Ordinance is categorically exempt from further CEQA review because it can be seen with certainty

that there is no possibility that the activity in question may have a significant effect on the environment.

## **PUBLIC COMMENT/OUTREACH**

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Staff provided public notice the application in accordance with City and State public noticing requirements. At the time of writing this report, there have been general inquiries from the public. A notice was published in the Milpitas Post on November 23, 2018 (two Fridays before the meeting). A public notice was also provided on the City's Website, [www.ci.milpitas.ca.gov](http://www.ci.milpitas.ca.gov), and posted at City Hall.

## **CITY COUNCIL REVIEW**

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The City Council will consider the proposed Zoning Ordinance text amendment at a City Council meeting to be scheduled for a future date. The Planning Commission will provide a final recommendation to the Council at the December 6, 2018 meeting.

## **CONCLUSION**

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The intent of the proposed Zoning Ordinance Text Amendment is to prohibit commercial cannabis uses citywide, regulate personal cultivation, and prohibit outdoor personal cultivation to protect the public health, safety, and welfare of residents in the City of Milpitas.

Staff recommends that the Planning Commission recommend that the City Council adopt Zoning Text Amendment ZA18-0004, as set forth in Exhibit B of the staff report, to prohibit commercial cannabis activities, prohibit outdoor cultivation of cannabis for personal use, and regulate the indoor cultivation of cannabis for personal use, based on the findings in this staff report and the attached resolution.

## **RECOMMENDATION**

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STAFF RECOMMENDS THAT the Planning Commission:

1. Open and Close Public Hearing; and
2. Consider the Exemption in accordance with CEQA;
3. Adopt Resolution 18-022 recommending that the City Council adopt Zoning Text Amendment ZA18-0004, as set forth in Exhibit B to the staff report.

## **ATTACHMENTS**

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A: Resolution No. 18-022

B: Ordinance No. xx.xxx

## **RESOLUTION NO. 18-022**

**A RESOLUTION OF THE PLANNING COMMISSION OF THE CITY OF MILPITAS  
RECOMMENDING THAT THE CITY COUNCIL ADOPT A CITY-INITIATED  
ZONING TEXT AMENDMENT TO ADD SECTION XI-10-13.15 ENTITLED  
“CANNABIS USES” AND AMENDING SECTION XI-10-13.05 ENTITLED “HOME  
OCCUPATION” OF THE MILPITAS MUNICIPAL CODE, TITLE XI, CHAPTER 10,  
TO REGULATE CANNABIS CULTIVATION FOR PERSONAL USE AND TO  
PROHIBIT ALL COMMERCIAL CANNABIS USES, AND MAKING CEQA FINDINGS  
OF EXEMPTION FROM ENVIRONMENTAL REVIEW PURSUANT TO CEQA  
GUIDELINES SECTIONS 15060(C)(3) AND 15061(B)(3)**

**WHEREAS**, the City of Milpitas, California (the “City”) is a municipal corporation, duly organized under the constitution and laws of the State of California; and

**WHEREAS**, California Government Code Section 65800 et seq. authorizes the adoption and administration of zoning laws, ordinances, rules and regulations by cities as a means of implementing the General Plan; and

**WHEREAS**, in 1996, the voters of the State of California approved the Compassionate Use Act of 1996 (“CUA”) (codified as Health and Safety Code, § 11362.5 et seq.) to enable seriously ill Californians to legally possess, use, and cultivate marijuana for personal medical use free from prosecution under enumerated provisions of State law; and

**WHEREAS**, in 2003, the California Legislature adopted the Medical Marijuana Program Act (“MMP”) (codified as Health and Safety Code, § 11362.7 et seq.), which permits qualified patients and their primary caregivers to associate collectively or cooperatively to cultivate marijuana for medical purposes without being subject to criminal prosecution under State law, however certain exemptions from criminal prosecution will expire on or about January 9, 2019 (Health & Safety Code, § 11362.775); and

**WHEREAS**, in 2013, the California Supreme Court issued its decision in *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal. 4th 729, holding that nothing in the CUA or MMP preempted cities’ authority to regulate or ban outright medical marijuana land uses; and

**WHEREAS**, in 2015, the California Legislature enacted the Medical Cannabis Regulation and Safety Act (MCRSA), which for the first time in the State’s history adopted comprehensive regulations and licensing for medical marijuana businesses; and

**WHEREAS**, in 2016, California voters approved Proposition 64, the Control, Regulate and Tax Adult Use of Marijuana Act (AUMA), which legalized the non-medical use of marijuana by adults over 21 years of age, and provides for State licensing of adult-use marijuana businesses; and

**WHEREAS**, Senate Bill 94 (“SB 94”), signed by the Governor on June 27, 2017 to take effect immediately, repealed the MCRSA, and amended AUMA to consolidate the State licensing scheme applicable to both medical and adult-use commercial cannabis activity under a new law entitled the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA); and

**WHEREAS**, MAUCRSA recognizes, preserves and does not supersede or limit the authority of a local jurisdiction to adopt and enforce local ordinances that regulate licensed cannabis businesses, including, but not limited to, completely prohibiting the establishment or operation of one or more types of businesses licensed under MAUCRSA within the local jurisdiction (Business and Professions Code, § 26200); and

**WHEREAS**, AUMA, as amended by MAUCRSA, legalizes cultivation of not more than six living cannabis plants per property by persons 21 years of age or older for personal use; and

**WHEREAS**, AUMA, as amended by MAUCRSA, provides that a city shall not completely prohibit personal cultivation of cannabis inside a private residence or inside an accessory structure to a private residence that is fully enclosed and secure, but that a city may completely prohibit personal cultivation of cannabis outdoors (Health and Safety Code, § 11362.2); and

**WHEREAS**, on January 17, 2017, the City Council adopted Urgency Ordinance No. 291 pursuant to Government Code Section 65858, establishing a forty-five (45) day moratorium on all marijuana uses to the extent allowed by law in light of the passage of Proposition 64 in the State of California; and

**WHEREAS**, on February 21, 2017, the City Council adopted Urgency Ordinance No. 291.1 pursuant to Government Code Section 65858, extending the moratorium on all marijuana uses for a period of 10 months and 15 days; and

**WHEREAS**, in January 2017, the City Council adopted Urgency Ordinance No. 291.2 pursuant to Government Code Section 65858, extending the moratorium for an additional 12-month period for the full two years authorized under State law, to allow the City to complete its study of potential cannabis regulations; and

**WHEREAS**, a City Council subcommittee, City staff and the City Council have conducted numerous meetings, community outreach, polling and analysis to determine what types of regulations, if any, the City would like to impose on marijuana/cannabis uses in light of the passage of AUMA and MAUCRSA in the State of California; and

**WHEREAS**, as a result of that study, and in accordance with Business and Professions Code, Section 26200, this Ordinance effects zoning limitations that prohibit the physical establishment or operation of all commercial cannabis uses within Milpitas, including all commercial cultivators, manufacturers, testing laboratories, retailers/dispensaries, delivery services, distributors and microbusinesses that are or will be licensed by the State of California

pursuant to the MAUCRSA, as the best course of action for the City's citizens and the community at large; and

**WHEREAS**, the Planning Commission makes and accepts as its own the findings set forth in this resolution; and

**WHEREAS**, the Planning Commission is an advisory body to the City Council; and

**WHEREAS**, as separate and independent bases, the Planning Commission hereby finds and determines that the project is exempt from further CEQA review pursuant to CEQA Guidelines section 15060(c)(3) (the activity is not a project as defined in Section 15378) and CEQA Guidelines section 15061(b)(3)(general rule exemption);and

**WHEREAS**, on December 6, 2018, the Planning Commission held a duly noticed public hearing on the subject application, at which all those in attendance were given the opportunity to speak on the Zoning Text Amendment; and

**WHEREAS**, the Planning Commission has considered all of the written and oral testimony presented at the public hearing in making its decision; and

**NOW THEREFORE**, the Planning Commission of the City of Milpitas hereby finds, determines and resolves as follows:

### **SECTION 1. Recitals.**

The Planning Commission has duly considered the full record before it, which may include but is not limited to such things as the City staff report, testimony by staff and the public, and other materials and evidence submitted or provided to the Planning Commission. Furthermore, the recitals set forth above are found to be true and correct and are incorporated herein by reference.

### **SECTION 2. CEQA Finding**

This Ordinance is not a project within the meaning of Section 15378 of the State of California Environmental Quality Act ("CEQA") Guidelines, because it has no potential for resulting in physical change in the environment, directly or indirectly, and therefore is exempt from environmental review pursuant to CEQA Guidelines Section 15060(c)(3). The Planning Commission further recommends that the City Council find, under CEQA Guidelines, Section 15061(b)(3), that if this Ordinance is a project, it is nonetheless exempt from further environmental review under the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment. The Ordinance prohibits commercial cannabis businesses and outdoor personal cannabis cultivation from establishing or occurring in the City and therefore will maintain current development levels. Accordingly, the Planning Commission recommends that the City Council finds that this Ordinance is categorically exempt from further CEQA review because it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment.

**SECTION 3. Findings for Zoning Amendment (Milpitas Municipal Code, Section XI-10-57-02(G)(3)) - *The Planning Commission makes the following findings based on the evidence in the public record in support of Zoning Text Amendment No. ZA18-0002:***

*1. The proposed amendment is consistent with the General Plan.*

The proposed Zoning Text Amendment is consistent with the adopted General Plan and all relevant specific plans. The prohibition of commercial cannabis activities and personal outdoor cultivation of cannabis would prevent potentially detrimental health, safety, and quality of life issues that can be associated with such uses, such as loitering, increased security risks to nearby residences and businesses, and strong odors that can be detectable beyond the property boundaries. Therefore, the proposed Zoning Text Amendment to permanently prohibit commercial cannabis uses reinforces the General Plan policies to foster community pride and growth through beautification of existing and future development and to prohibit incompatible land uses in industrial zoning districts (Milpitas General Plan, Land Use Element, Policy 2.a-I-9 and Policy 2.a-I-17) and those policies intended to protect and develop commercial districts as attractive and economically vital areas that promote the City's image (Milpitas General Plan, Land Use Element, Policies 2.a-I-27 (Town Center), 2.a-I-29 (Midtown Area), 2.a-I-31 (Transit Area)).

Because cannabis remains illegal under federal law, cannabis-related businesses have limited access to the banking system and largely operate on a cash-only basis. This characteristic makes cannabis businesses attractive for robbery, burglary, and other theft offenses. Additionally, the strong smell and visibility of marijuana cultivated outdoors or even grown or stored indoors creates an "attractive nuisance" that can increase the risk of crime. Commercial scale cultivation, processing, and manufacture can also lead to excess or dangerous waste, water, and electricity usage. Therefore the prohibition on commercial cannabis uses is consistent with the General Plan, Land Use Element, Policy 2.d-I-3, to consider the availability and potential impacts of major land use or policy changes on existing police, fire and other municipal services.

In addition, the prohibition on commercial cannabis uses and outdoor personal cannabis cultivation is consistent with the City's principle of maintaining a land use program that balances Milpitas' regional and local roles by providing for a highly amenable community environment and a thriving regional industrial center (Milpitas General Plan, Land Use Element, Policy 2.a-G-1). At this time, the potential fiscal and economic benefits of commercial cannabis uses are outweighed by the potential costs and adverse community environment impacts, particularly to youth and quality of life issues. Adoption of this ordinance would be consistent with the intent of the City's existing General Plan regulations that would serve to protect the public health, safety and welfare of the citizens of Milpitas. The prohibition of commercial cannabis activities and personal outdoor cannabis cultivation will not conflict with or impede achievement of any of the goals, policies, or land use designations established in the General Plan.

*2. The proposed amendment will not adversely affect the public health, safety and welfare.*

The proposed amendments to prohibit commercial cannabis activities and personal outdoor cultivation of cannabis will not adversely affect the public health, safety and welfare because it will maintain current development patterns and uses in the City. Further, the prohibition of commercial cannabis activities and personal outdoor cultivation of cannabis would prevent potentially detrimental health, safety, and quality of life issues that can be associated with such uses, such as loitering, increased security risks to nearby residences and businesses, increased risk of theft and other crimes, dangerous waste, water, and electricity usage, and strong odors that can be detectable beyond the property boundaries.

**SECTION 4:** The Planning Commission of the City of Milpitas hereby adopts Resolution No. 18-022 recommending that the City Council adopt Zoning Text Amendment ZA18-0004 based on the above Findings.

**PASSED AND ADOPTED** at a regular meeting of the Planning Commission of the City of Milpitas on December 6, 2018.

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Chair

**TO WIT:**

**I HEREBY CERTIFY** that the following resolution was duly adopted at a regular meeting of the Planning Commission of the City of Milpitas on December 6, 2018 and carried by the following roll call vote:

COMMISSIONER	AYES	NOES	ABSENT	ABSTAIN
Lawrence Ciardella				
Ray Maglalang				
Sudhir Mandal				
Demetress Morris				
Gurdev Sandhu				
Zeya Mohsin				
Evelyn Chua (Alternate)				

FOR DISCUSSION ONLY

**REGULAR**

**NUMBER:**    \_\_. \_\_

**TITLE:**        A ZONING ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MILPITAS ADDING SECTION XI-10-13.15 ENTITLED “CANNABIS USES” AND AMENDING SECTION XI-10-13.05 ENTITLED “HOME OCCUPATION” OF ~~THE~~ MILPITAS MUNICIPAL CODE, TITLE XI, CHAPTER 10, TO REGULATE CANNABIS CULTIVATION FOR PERSONAL USE AND TO PROHIBIT ALL COMMERCIAL CANNABIS USES, AND MAKING FINDINGS OF EXEMPTION FROM ENVIRONMENTAL REVIEW PURSUANT TO CEQA GUIDELINES SECTIONS 15060(C)(3) AND 15061(b)(3)

**HISTORY:**    This Ordinance was introduced (first reading) by the City Council at its meeting of \_\_\_\_\_, upon motion by \_\_\_\_\_ and was adopted (second reading) by the City Council at its meeting of \_\_\_\_\_, upon motion by \_\_\_\_\_. The Ordinance was duly passed and ordered published in accordance with law by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

ATTEST:

\_\_\_\_\_  
Mary Lavelle, City Clerk

\_\_\_\_\_  
Rich Tran, Mayor

APPROVED AS TO FORM:

\_\_\_\_\_  
Christopher J. Diaz, City Attorney

**FOR DISCUSSION ONLY**

**RECITALS AND FINDINGS:**

**WHEREAS**, the City of Milpitas, California (the “City”) is a municipal corporation, duly organized under the constitution and laws of the State of California; and

**WHEREAS**, California Government Code Section 65800 et seq. authorizes the adoption and administration of zoning laws, ordinances, rules and regulations by cities as a means of implementing the General Plan; and

**WHEREAS**, in 1996, the voters of the State of California approved the Compassionate Use Act of 1996 (“CUA”) (codified as Health and Safety Code, § 11362.5 et seq.) to enable seriously ill Californians to legally possess, use, and cultivate marijuana for personal medical use free from prosecution under enumerated provisions of State law; and

**WHEREAS**, in 2003, the California Legislature adopted the Medical Marijuana Program Act (“MMP”) (codified as Health and Safety Code, § 11362.7 et seq.), which permits qualified patients and their primary caregivers to associate collectively or cooperatively to cultivate marijuana for medical purposes without being subject to criminal prosecution under State law, however certain exemptions from criminal prosecution will expire on or about January 9, 2019 (Health & Safety Code, § 11362.775); and

**WHEREAS**, in 2013, the California Supreme Court issued its decision in *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal. 4th 729, holding that nothing in the CUA or MMP preempted cities’ authority to regulate or ban outright medical marijuana land uses; and

**WHEREAS**, in 2015, the California Legislature enacted the Medical Cannabis Regulation and Safety Act (MCRSA), which for the first time in the State’s history adopted comprehensive regulations and licensing for medical marijuana businesses; and

**WHEREAS**, in 2016, California voters approved Proposition 64, the Control, Regulate and Tax Adult Use of Marijuana Act (AUMA), which legalized the non-medical use of marijuana by adults over 21 years of age, and provides for State licensing of adult-use marijuana businesses; and

**WHEREAS**, Senate Bill 94 (“SB 94”), signed by the Governor on June 27, 2017 to take effect immediately, repealed the MCRSA, and amended AUMA to consolidate the State licensing scheme applicable to both medical and adult-use commercial cannabis activity under a new law entitled the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA); and

**WHEREAS**, MAUCRSA recognizes, preserves and does not supersede or limit the authority of a local jurisdiction to adopt and enforce local ordinances that regulate licensed cannabis businesses, including, but not limited to, completely prohibiting the establishment or operation of one or more types of businesses licensed under MAUCRSA within the local jurisdiction (Business and Professions Code, § 26200); and

**WHEREAS**, AUMA, as amended by MAUCRSA, legalizes cultivation of not more than six living cannabis plants per property by persons 21 years of age or older for personal use; and

**WHEREAS**, AUMA, as amended by MAUCRSA, provides that a city shall not completely prohibit personal cultivation of cannabis inside a private residence or inside an accessory structure to a private residence that is fully enclosed and secure, but that a city may completely prohibit personal cultivation of cannabis outdoors (Health and Safety Code, § 11362.2); and

**WHEREAS**, on January 17, 2017, the City Council adopted Urgency Ordinance No. 291 pursuant to Government Code Section 65858, establishing a forty-five (45) day moratorium on all marijuana uses to the extent allowed by law in light of the passage of Proposition 64 in the State of California; and

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**WHEREAS**, on February 21, 2017, the City Council adopted Urgency Ordinance No. 291.1 pursuant to Government Code Section 65858, extending the moratorium on all marijuana uses for a period of 10 months and 15 days; and

**WHEREAS**, in January 2017, the City Council adopted Urgency Ordinance No. 291.2 pursuant to Government Code Section 65858, extending the moratorium for an additional 12-month period for the full two years authorized under State law, to allow the City to complete its study of potential cannabis regulations; and

**WHEREAS**, a City Council subcommittee, City staff and the City Council have conducted numerous meetings, community outreach, polling and analysis to determine what types of regulations, if any, the City would like to impose on marijuana/cannabis uses in light of the passage of AUMA and MAUCRSA in the State of California; and

**WHEREAS**, as a result of that study, and in accordance with Business and Professions Code, Section 26200, this Ordinance effects zoning limitations that prohibit the physical establishment or operation of all commercial cannabis uses within Milpitas, including all commercial cultivators, manufacturers, testing laboratories, retailers/dispensaries, delivery services, distributors and microbusinesses that are or will be licensed by the State of California pursuant to the MAUCRSA, as the best course of action for the City's citizens and the community at large.

**NOW, THEREFORE**, the City Council of the City of Milpitas does ordain as follows:

**SECTION 1. RECORD AND BASIS FOR ACTION**

The City Council has duly considered the full record before it, which may include but is not limited to such things as the City staff report, testimony by staff and the public, and other materials and evidence submitted or provided to the City Council. Furthermore, the recitals set forth above are found to be true and correct and are incorporated herein by reference.

**SECTION 2. MUNICIPAL CODE AMENDMENT**

The City Council hereby adds Section XI-10-13.15 entitled "Cannabis Uses" to the Milpitas Municipal Code, Title XI, Chapter 10, as set forth on Exhibit A, attached hereto and incorporated herein by this reference.

**SECTION 3. MUNICIPAL CODE AMENDMENT**

The City Council hereby amends and restates Subsection (B)(9) of Section XI-10-13.05 entitled "Home Occupation" of the Milpitas Municipal Code, Title XI, Chapter 10, as follows:

"9. The occupations listed below shall not be considered incidental and secondary to the residence because they will change the residential character of the dwelling and because they change the character of the neighborhood:

- a. Barber and beauty shops or similar cosmetology establishments;
- b. Kennels and other boarding for pets;
- c. Mechanical and auto repairs;
- d. Medical and dental offices;
- e. Retail sales (excluding retail sales in which all products are sold over the phone or internet and shipped to the customer);
- f. Commercial cannabis uses. See Section XI-10-13.15.

All other provisions contained in Section XI-10-13.05 of the Milpitas Municipal Code shall remain in full force and effect.

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### **SECTION 4. MUNICIPAL CODE AMENDMENT**

The City Council hereby repeals and reserves Chapter 5 of the Milpitas Municipal Code, Title XI.

### **SECTION 5. CALIFORNIA ENVIRONMENTAL QUALITY ACT**

This Ordinance is not a project within the meaning of Section 15378 of the State of California Environmental Quality Act (“CEQA”) Guidelines, because it has no potential for resulting in physical change in the environment, directly or indirectly, and therefore is exempt from environmental review pursuant to CEQA Guidelines, Section 15060(c)(3). The City Council further finds that if this Ordinance is deemed to be a project, it is nonetheless exempt from further environmental review under the general rule stated in CEQA Guidelines, Section 15061(b)(3), that CEQA applies only to projects which have the potential for causing a significant effect on the environment. The Ordinance prohibits commercial cannabis businesses and outdoor personal cannabis cultivation from establishing or occurring in the City and therefore will maintain current development levels. Accordingly, the City Council finds that this Ordinance is categorically exempt from further CEQA review because it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment.

### **SECTION 6. SEVERABILITY**

If any section, subsection, subdivision, sentence, clause, phrase, or portion of this Ordinance for any reason is held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance. The City Council hereby declares that it would have adopted this Ordinance, and each section, subsection, subdivision, sentence, clause, phrase, or portion thereof, irrespective of the fact that any one or more sections, subsections, subdivisions, sentences, clauses, phrases, or portions thereof be declared invalid or unconstitutional.

### **SECTION 7. CUSTODIAN OF RECORDS**

The documents and materials that constitute the record of proceedings on which this Ordinance is based are located at the City Clerk’s office located at 455 East Calaveras Blvd., Milpitas, CA 95305. The custodian of these records is the City Clerk.

### **SECTION 8. RESTATEMENT OF EXISTING LAW**

The adoption of this Ordinance shall not in any manner affect the prosecution for violations of ordinances, which violations were committed prior to the effective date hereof, nor be construed as a waiver of any license or penalty or the penal provisions applicable to any violation thereof.

### **SECTION 9. EFFECTIVE DATE**

Pursuant to Government Code, Section 36937, this Ordinance shall take effect thirty (30) days after its final passage.

### **SECTION 10. CERTIFICATION**

The City Clerk shall certify as to the adoption of this Ordinance and shall cause it to be published within fifteen (15) days of the adoption and shall post a certified copy of this Ordinance, including the vote for and against the same, in the Office of the City Clerk, in accordance with California Government Code Section 36933.

### **SECTION 11. FILING WITH STATE**

The City Clerk shall submit a copy of this ordinance to the Bureau of Cannabis Control as provided by Business and

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Professions Code, Section 26055.

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**EXHIBIT A**

**XI-10-13.15 - Cannabis Uses**

- A. Purpose. The purpose of this Section is to prohibit the establishment and operation of all commercial cannabis uses within the City of Milpitas, including all cannabis dispensaries, cannabis retailers, cannabis manufacturers, cannabis microbusinesses, cannabis testing laboratories, cannabis distribution, cannabis cultivation, and delivery of cannabis. It is also the intent of this Section to regulate indoor cannabis cultivation, and to prohibit all outdoor cultivation, for personal use, including by qualified patients and primary caregivers.
- B. Definitions. For purposes of this Section, the following definitions shall apply:
1. "Cannabis" means all parts of the plant *Cannabis sativa* Linnaeus, *Cannabis indica*, or *Cannabis ruderalis*, whether growing or not; the seeds thereof; the resin, whether crude or purified, extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin. "Cannabis" also means the separated resin, whether crude or purified, obtained from marijuana. "Cannabis" includes "cannabis" as defined in Business and Professions Code, Section 26001 and in Section 11018 of the Health and Safety Code.
  2. "Cannabis cultivation" means any activity involving the planting, growing, harvesting, drying, curing, grading, or trimming of cannabis.
  3. "Cannabis delivery" means the commercial transfer of cannabis or cannabis products to a customer. "Cannabis delivery" also includes the use by a cannabis retailer of any technology platform that enables customers to arrange for or facilitate the commercial transfer by a licensed retailer of cannabis or cannabis products.
  4. "Cannabis distribution" means the procurement, sale, and transport of cannabis and cannabis products and any other activity allowed under the State distributor license(s), including, but not limited to, cannabis storage, quality control and collection of State cannabis taxes.
  5. "Cannabis manufacture" means to compound, blend, extract, infuse, or otherwise make or prepare a cannabis product. Cannabis manufacture includes the production, preparation, propagation, or compounding of manufactured cannabis, or cannabis products either directly or indirectly or by extraction methods, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis at a fixed location that packages or repackages medical cannabis or cannabis products or labels or relabels its container.
  6. "Cannabis microbusiness" means a commercial cannabis business that must engage in at least three of the following commercial cannabis activities: cultivation, manufacturing using nonvolatile solvents, distribution, and/or retail.
  7. "Cannabis products" means cannabis that has undergone a process whereby the plant material has been transformed into a concentrate, including, but not limited to, concentrated cannabis, or an edible or topical product containing cannabis or concentrated cannabis and other ingredients. Cannabis products include "cannabis products" as defined in Business and Professions Code, Section 26001.
  8. "Cannabis retailer" means a facility where cannabis or cannabis products are offered, either individually or in any combination, for retail sale, including an establishment that delivers cannabis and cannabis products as part of a retail sale or conducts sales exclusively by delivery. The term "cannabis retailer" includes any nonprofits that may be licensed under Business and Professions Code, Section 26070.5. For purposes of this Chapter, "cannabis retailer" also includes medical cannabis dispensaries, patient collectives and cooperatives operating, or proposing to operate, pursuant to the Compassionate Use Act (Health and Safety Code, § 11362.5) and/or

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the Medical Marijuana Program (Health and Safety Code, § 11362.7 et seq.), as may be amended.

9. “Cannabis testing laboratory” means a facility, entity, or site in the State that offers or performs tests of cannabis or cannabis products.
10. “Commercial cannabis use” includes all cannabis cultivation, cannabis manufacture, cannabis distribution, cannabis testing laboratories, cannabis microbusinesses, cannabis retailers, cannabis delivery, and sale of cannabis and/or cannabis products, whether intended for medical or adult-use, and whether or not such activities are carried out for profit. Commercial cannabis uses includes “commercial cannabis activity” as defined in Business and Professions Code, Section 26001, and includes any activity that requires, or may require in the future, a license from a State licensing authority pursuant to the Medicinal and Adult-Use Cannabis Regulation and Safety Act (Business and Professions Code, Division 10), as may be amended. Commercial cannabis use does not include those activities allowed for personal use by persons 21 years of age or older, without any compensation whatsoever, in strict accordance with Health and Safety Code, Section 11362.1 and does not include the activities of a qualified patient or a primary caregiver that are exempt from State licensure pursuant to Business and Professions Code, Section 26033.
11. “Indoor” means any location that is totally contained within a fully enclosed and secure private residence or accessory building located on the grounds of the private residence.
12. “Personal cultivation” means cannabis cultivation for a natural person’s own personal use and possession in accordance with this Code and state law, including but not limited to Health and Safety Code Sections 11362.1 and 11362.2, as may be amended, and such person does not sell or distribute cannabis to any other person. “Personal use” also means and includes cultivation of medical cannabis conducted by a qualified patient exclusively for his or her personal medical use, and cultivation conducted by a primary caregiver for the personal medical purposes of no more than five specified qualified patients for whom he or she is the primary caregiver, in accordance with state law, including Health and Safety Code Sections 11362.7 and 11362.765, as may be amended. Except as herein defined, personal cultivation does not include, and shall not authorize, any cultivation conducted as part of a business or commercial activity, including cultivation for compensation or retail or wholesale sales of cannabis.
13. “Private residence” means a house, an apartment unit, accessory dwelling unit, a mobile home, or other similar dwelling occupied for residential purposes.
14. “Outdoor” means any location that is not totally contained within a fully enclosed and secure accessory building or primary residence.

### C. Personal Cultivation of Cannabis.

1. Indoor Personal Cultivation. The indoor personal cultivation of cannabis is prohibited except in compliance with the following:
  - a. Cannabis cultivation shall only occur indoors at a private residence, or inside an accessory structure located upon the grounds of a private residence.
  - b. Cannabis cultivation shall be limited to six plants total per residence, whether immature or mature, regardless of how many residents reside at the private residence.
  - c. Persons engaging in indoor cultivation must comply with all State and local laws regarding fire safety, water use, electrical wiring, buildings, and indoor cultivation, and with Health and Safety Code Sections 11362.1 and 11362.2.

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- d. The use of gas products (CO<sub>2</sub>, butane, propane, natural gas, etc.) or generators for cultivation of cannabis is prohibited. Use of gas products shall be limited to those allowed by the California Building, Electrical, and Fire Codes as adopted and amended by the City of Milpitas.
- e. The residence shall maintain fully functional and usable kitchen, bathroom, and bedroom areas for their intended use by the resident(s), and the premises shall not be used primarily or exclusively for cannabis cultivation.
- f. All areas used for cannabis cultivation shall be located within a fully enclosed and secure structure. "Fully enclosed and secure structure" means a space within a building, greenhouse or other legal structure which has a complete roof enclosure supported by connecting walls extending from the ground to the roof, which is secure against unauthorized entry, provides complete visual screening, and which is accessible only through one or more lockable doors and inaccessible to minors.

2. Outdoor Personal Cultivation Prohibited. Outdoor personal cultivation of cannabis is prohibited in all zoning districts in the City of Milpitas.

### D. Commercial Cannabis Uses.

1. Commercial Cannabis Uses Prohibited. All medical and adult-use commercial cannabis uses as defined herein are prohibited from establishing or operating within the City of Milpitas. No use permit, variance, building permit, or any other entitlement or permit, whether administrative or discretionary, shall be approved or issued for the establishment or operation of a commercial cannabis use in any zoning district, and no person shall otherwise establish such businesses or operations in any zoning district.
2. Deliveries. To the fullest extent allowed by State law, the ban on commercial cannabis uses also prohibits the operation of a cannabis delivery service to customers in the City of Milpitas, including those deliveries originating from a physical location outside of the City.
3. This section shall not be construed to prohibit use of the public roads pursuant to Business and Professions Code, Section 26090 or those activities allowed by Section 26054, subdivisions (c) or (d).

### E. Public Nuisance; Effect of State Law.

1. It is hereby declared to be a public nuisance for any person owning, leasing, occupying, or having charge or possession of any real property in the City to cause or allow such real property to be used for a commercial cannabis use or for the cultivation of cannabis except in strict compliance with this Chapter. Any condition caused or permitted to exist in violation of any of the provisions of this Chapter may be abated as a public nuisance as provided in this Code and/or under State law.
2. In the event of any conflict between the penalties enumerated under this Code and any penalties set forth in State law, the maximum penalties allowable under State law shall govern. The City Attorney or prosecuting attorney has the authority to declare and prosecute the violation as the maximum penalty permitted by State law, including but not limited to, those penalties prescribed by California Health & Safety Code, Section 11362.4. To the extent certain conduct is immune from arrest and criminal liability pursuant to State law, including the Compassionate Use Act of 1996 (Health and Safety Code Section 11362.5) or the Medical Marijuana Program (Health and Safety Code Section 11362.7 et seq.), criminal penalties shall not apply.